Adela Buena Alpedes (as the sale executive and trutees of the estate of the late Lee Beng Han) v Excel Electronics (M) Sdn Bhd & Ors

HIGH COURT (KUALA LUMPUR) — PETITION NO D5–26–77 OF 2006
RAMLY ALI J
12 JUNE 2007

Companies and Corporations — Members' rights — Oppression — Petition for relief — Petitioner was widow, sole executrix and trustee founder's estate and holder of 50% of shareholding — Petitioner alleged that fourth respondent was vehicle of second and third respondents' fraud — Whether there was oppression — Companies Act 1965 s 181

Companies and Corporations — Members' rights — Petition under Companies Act 1965 s 181 — Petitioner was widow, sole executrix and trustee of founder's estate and holder of 50% of the shareholding — Whether in substance an incorporated partnership — Whether just and equitable ground for company to be wound up — Whether petitioner had legitimate expectation to continue as a partner of second respondent

The petitioner filed this petition under s 181 of the Companies Act 1965. The petitioner was the widow, and sole executrix and trustee of the estate of the late Lee Beng Han ('LBH') who died on 21 February 2002. LBH together with the second respondent were at the material times, the founders and holders of the entire paid up capital of the first respondent. The second and third respondents were the only directors and shareholders of the fourth respondent who carried on the same or identical business to that of the first respondent. The petitioner moved the court to consider the matter of the first respondent company and the fraudulent and unconscionable conduct of the second to fourth respondents wholly acting in concert to prejudice the interests of the late LBH and/or his successors in title. In particular, the petitioner alleged that the fourth respondent was the vehicle of the second and third respondents' fraud and the beneficiary of the first respondent's business and assets through unlawful means. The petitioner alleged that upon the illness and subsequent demise of the late LBH who at the material times held 50% of the shareholding of the first respondent, the second and third respondents' greed and opportunistic behaviour as the only directors of the company was calculated to shut out the petitioner from participating in the affairs of the first respondent and so render the said shareholding worthless by systematically siphoning of the first respondent's business and assets to the benefit of the fourth respondent. The respondents said that despite the late LBH's 50% shareholding, the petitioner and/or successors was not entitled to assert rights attached to such shareholding because of the alleged understanding/arrangement. They also said that not only was the first respondent losing money and was in financial problems, the fourth respondent was also trading at a loss so there was no question of the fourth respondent benefiting at the expense of the first respondent. The respondents denied

A that there was any diversion of the customers of the first respondent to the fourth respondent. Any notices sent to the customers of the first respondent were the personal customers of the second respondent and as the sole surviving partner of the first respondent; he was entitled to such customers procured by him. The issues for determination by this court were whether on the facts and circumstances of this B matter, the first respondent was incorporated by LBH and the second respondent as an incorporated partnership on a mutual trust and confidence basis. If so, whether the second respondent was obliged to continue with the business of the first respondent with the petitioner, LBH's wife, upon the demise of LBH.

C

Held, dismissing the petition with costs:

(1) Save for bare denials, the petitioner had not furnished any evidence to refute the fact that LBH and the second respondent were in effect partners in the first respondent and further that there were legitimate expectations vis a vis LBH D and the second respondent that the relationship between them was on the basis of mutual trust and confidence and that upon a breakdown of that mutual trust and confidence or upon the demise of either one of them, the first respondent would be dissolved accordingly. On the facts of this matter, the second respondent was not obliged to accept the petitioner as the executor of E LBH to continue as shareholder in the first respondent (see para 41).

(2) The court was of the view that the petitioner had no rights vis a vis the frist respondent whether in her capacity as a shareholder or otherwise upon the death of LBH when the shares were transmitted into her names pursuant to the Grant of Probate obtained by the petitioner. Further, the petitioner was not a F purchaser of LBH's shares in the first respondent for value and therefore took the shares subject to the second respondent's equitable interest as partner and shareholder in the first respondent pursuant to his understanding with LBH (see para 42).

(3) The contemporaneous documents in this matter points towards the fact that G the relationship of LBH and the second respondent in the first respondent were akin to a partnership on a mutual trust and confidence basis. In the circumstances, the principles of partnership law must apply in this case whereupon the demise of one partner, the surviving partner should dissolve the partnership. The first respondent company was now in a state which could not H have been contemplated by the parties when the company was formed. Upon the death of a shareholder, the remaining shareholder may refuse to register the executor of the deceased as a shareholder. This amounted to a 'just and equitable' ground for the first respondent to be wound up (see paras 43–44); *Re Yenidje Tobacco Co Ltd* [1916] 2 Ch D 426; *Ebrahimi v Westbourne Galleries Ltd & Ors* [1972] 2 All ER 492; *Re Cuthbert Cooper & Sons* [1937] I 2 All ER 466 followed.

(4) The court found that there was no evidence to support the petitioner's complaint of oppression. The matters alleged to be oppression by the petitioner were merely management or operational matters and did not amount to oppression in law. Finally, the petitioner had no legitimate expectation to

continue as a partner of the second respondent. In fact, the second respondent had a legitimate expectation to have the first respondent wound up (see para 58).

[Bahasa Malaysia summary

Pempetisyen memfailkan petisyen ini di bawah seksyen 181 Akta Syarikat 1965. Pempetisyen adalah balu dan wasi dan pemegang amanah tunggal harta pusaka si mati Lee Beng Han ('LBH') yang meninggal pada 21 Februari 2002. LBH bersama dengan responden kedua adalah pada masa yang material, pengasas-pengasas dan pemegang-pemegang keseluruhan modal berbayar responden pertama. Responden kedua dan ketiga adalah pengarah-pengarah dan pemegang-pemegang saham tunggal responden keempat yang menjalankan perniagaan yang sama atau lebih kurang sama dengan responden pertama. Pempetisyen telah memohon mahkamah untuk mempertimbangkan perkara syarikat responden pertama dan perbuatan fraud dan perlakuan yang tidak berpatutan responden-responden kedua sehingga keempat yang bertindak bersama-sama untuk memprejudiskan kepentingan-kepentingan LBH dan/atau waris-warisnya. Terutama sekali, pempetisyen menyatakan bahawa responden keempat adalah kenderaan fraud yang digunakan oleh responden kedua dan ketiga dan benefisiari perniagaan responden pertama dan aset-asetnya melalui cara-cara yang menyalahi undang-undang. Pempetisyen menyatakan bahawa LBH yang pada masa yang material memegang 50% pegangan saham di responden pertama telah jatuh sakit dan kemudiannya meninggal dunia, tingkah laku tamak responden kedua dan ketiga sebagai pengarah-pengarah tunggal syarikat tersebut adalah bermaksud untuk mengenepikan pempetisyen daripada mencampuri hal ehwal responden pertama dan dengan itu menyebabkan pegangan saham tidak lagi bernilai dengan menyalurkan secara sistematik perniagaan dan aset-aset responden pertama untuk kepentingan responden keempat. Responden-responden telah menyatakan bahawa walaupun LBH memegang 50% pegangan saham, pempetisyen dan/atau waris-warisnya tidak berhak menegaskan hak sebagai pemegang saham oleh kerana terdapat persefahaman/persetujuan. Mereka juga menyatakan bahawa bukan sahaja responden pertama telah kehilangan wang dan menghadapi masalah kewangan, responden keempat juga menghadapi kerugian perniagaan dengan itu tiada persoalan bahawa responden keempat mendapat faedah yang menjejaskan responden pertama. Responden-responden telah menafikan bahawa terdapat sebarang pemindahan pelanggan-pelanggan responden pertama ke responden keempat. Sebarang notis-notis yang dihantar kepada pelanggan-pelanggan responden pertama adalah pelanggan-pelanggan peribadi responden kedua dan sebagai satu-satunya rakan kongsi responden pertama, beliau berhak kepada pelanggan-pelanggan yang didapati melalui dirinya. Isu untuk keputusan mahkamah ini adalah sama ada berdasarkan fakta-fakta dan keadaan-keadaan perkara ini, responden pertama yang ditubuhkan oleh LBH dan responden kedua sebagai satu perkongsian yang diperbadankan berdasarkan perhubungan saling percaya dan yakin. Sekiranya begini, sama ada responden kedua wajib untuk meneruskan perniagaan responden pertama bersama pempetisyen, isteri LBH, setelah peninggalan LBH.

Diputuskan, menolak petisyen dengan kos:

(1) Selain daripada penafian-penafian kosong, pempetisyen tidak melampirkan sebarang bukti untuk menyangkal fakta bahawa LBH dan responden kedua sebenarnya rakan kongsi di responden pertama dan juga terdapat satu jangkaan-jangkaan yang sah vis a vis perhubungan LBH dan responden kedua adalah berdasarkan saling percaya dan yakin dan setelah kemerosotan saling percaya dan yakin tersebut atau selepas kematian salah satu daripada mereka, responden pertama akan digulungkan. Atas fakta-fakta perkara ini, responden kedua tidak wajib untuk menerima pempetisyen sebagai wasi tunggal LBH untuk meneruskan sebagai pemegang saham responden pertama (lihat perenggan 41).

(2) Mahkamah berpendapat bahawa pempetisyen tiada hak vis a vis responden pertama sama ada dalam kapasitinya sebagai pemegang saham ataupun cara lain selepas kematian LBH apabila saham-saham tersebut ditukar kepada namanya menurut Geran Probet yang diperolehi pempetisyen. Selanjutnya, pempetisyen bukanlah pembeli saham-saham LBH di responden pertama untuk nilai dan dengan itu telah mengambil saham-saham tersebut tertakluk kepada kepentingan ekuiti responden kedua sebagai rakan kongsi menurut persefahamannya dengan LBH)lihat perenggan 42).

(3) Dokumen-dokumen semasa dalam perkara ini menunjukkan fakta bahawa perhubungan LBH dan responden kedua di responden pertama adalah sama seperti satu rakan perkongsian berdasarkan saling percaya dan yakin. Dalam keadaan ini, prinsip-prinsip undang-undang perkongsian harus dipakai kepada kes ini di mana dengan kematian seseorang rakan perkongsian, rakan kongsi yang satu lagi patut membubarkan perkongsian tersebut. Syarikat responden pertama kini berada di satu peringkat yang tidak dapat dijangka oleh pihak-pihak apabila syarikat tersebut dibentuk. Dengan kematian seorang pemegang saham, pemegang saham yang tinggal mungkin enggan mendaftarkan wasi harta pusaka si mati sebagai seorang pemegang saham. Ini membawa kepada satu alasan bahawa ia adalah 'adil dan saksama' untuk responden pertama digulungkan (lihat perenggan 43–44); *Re Yenidje Tobacco Co Ltd* [1916] 2 Ch D 426; *Ebrahimi v Westbourne Galleries Ltd & Ors* [1972] 2 All ER 492; *Re Cuthbert Cooper & Sons* [1937] 2 All ER 466 diikut.

(4) 4. Mahkamah mendapati tiada bukti untuk menyokong aduan pempetisyen akan satu penindasan. Perkara-perkara yang dikatakan penindasan oleh pempetisyen hanyalah sekadar perkara berhubung dengan pengurusan dan operasi dan tidak membawa kepada penindasan di undang-undang. Akhir sekali, pempetisyen tidak mempunyai jangkaan sah untuk meneruskan sebagai seorang rakan kongsi responden kedua. Sebenarnya, responden kedua mempunyai jangkaan sah untuk menggulungkan responden pertama (lihat perenggan 58).]

Notes

For a case on petition under s 1818 of the Companies Act 1965, see 3(2) *Mallal's Digest* (4th Ed, 2006 Reissue) para 550.

For cases on oppression of members' right, see 3(2) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 501–548.

Cases referred to

Ebrahimi v Westbourne Galleries Ltd & Ors [1972] 2 All ER 492; [1973] AC 360 (folld)
Indrani a/p Rajaratnam & Ors v Fairview Schools Bhd [1997] 5 MLJ 267 (refd)
Kok Fook Sang v Juta Vila (M) Sdn Bhd [1996] 2 MLJ 666 (refd)
Cuthbert Cooper & Sons, Re [1937] 2 All ER 466 (folld)
Elgindata Ltd, Re [1991] BCLC 959 (refd)
Five Minute Car Wash Services Ltd, Re [1966] 1 All ER 242 (refd)
Lo Siong Fong, Re [1994] 2 MLJ 72 (refd)
Soul D Harrison & Sons Plc, Re [1995] 1 BCLC 14 (refd)
Yenidje Tobacco Co Ltd, Re [1916] 2 Ch D 426 (folld)

Legislation referred to

Companies Act 1965 ss 181, 218(1)(i)

Benjamin Yean (David Mathew with him) (benjamin Yean & Co) for the petitioner.
Norliza Rasool Khan (Zul rafique & Partners) for the respondents.

Ramly Ali J:

THE PETITION

[1] The present petition is filed by the petitioner under s 181 of the Companies Act 1965 for the following reliefs:

(i) that the court do order that the deceased's/LBH's shares in the first respondent be purchased by such other person(s) or member(s) of the first respondent at a value deemed fit and proper by this court;

(ii) that in the event this court do order the purchase of the deceased's/LBH's shares in the first respondent, suitable provision be made should the need arise for the reduction of the share capital;

(iii) that the second and/or third respondents do account fully for all dealings in relation to the first respondent or its assets and monies for the period from 1 January 2002 in the form of an affidavit to be verified by each of them and to be filed in court within two weeks or such other time as shall be prescribed by this court;

(iv) that the fourth respondent do account fully for all dealings in its business since the date of its incorporation in the form of an affidavit to be verified by the second and/or third respondent and to be filed in court within two weeks or such other time as shall be prescribed by this Court;

(v) that an inquiry be held to determine the veracity and accuracy of the said accounts and also to determine if the first respondent has suffered loss and damage as a result of the oppressive acts and/or omissions of the second and/or

third respondents whether by themselves and/or in collusion with the fourth respondent;

(vi) an order that the second and third respondents and/or the fourth respondent do pay the first respondent damages arising from the oppressive acts and/or omission set out in this petition and interests thereon at such rate and for such period in this court deems fit and just;

(vii) such further directions and orders pursuant to s 181(2) of the Companies Act 1965 deemed fit and proper for the future management and/or further conduct of the management of the business and affairs of the first respondent;

(viii) interest on any amount/damages found to be due at such rate and for such period as this court shall deem fit and just;

(ix) an order that the second to fourth respondents do jointly and severally pay the costs of and incidental to this petition as incurred by the petitioner without recourse to the funds or assets of the first respondent;

(x) that there be liberty to apply;

(xi) such other order or relief as may be made in the premises under s 181 of the Companies Act 1965 or otherwise as shall be deemed fit and proper by this court; and

(xii) alternatively, that Excel Electronics (Malaysia) Sdn Bhd., the first respondent abovenamed be wound up by this court under the provision of the Companies Act 1965, specifically s 218(1)(i) thereof with necessary consequential orders therefrom.

THE PARTIES

[2] The petitioner is a citizen of the Philippines and is the widow, and sole executrix and trustee of the estate of the late Lee Beng Han ('the deceased' or 'LBH') who died on or about 21 February 2002. Probate of the deceased's estate was granted to the petitioner vide Kuala Lumpur High Court Probate No S 1–32–394–2002 on or about 29 July 2002. The deceased's estate has assets within the jurisdiction of this Court.

[3] The second respondent is a Malaysia citizen of full age and has an address for service at No 22, Jalan BRP 5/7, Bukit Rahman Putra, 47000 Sungei Buloh, Selangor.

[4] The third respondent is a Malaysian citizen of full age and is the wife of the second respondent.

[5] The fourth respondent is a private limited company incorporated under the laws of Malaysia on or about 2 April 2002. The second and third respondents are the only directors and shareholders of the fourth respondent who carry on the same or identical business to that of the first respondent.

[6] Excel Electronics (Malaysia) Sdn Bhd., the first respondent abovenamed, was incorporated on or about 25 September 1996 under the Companies Act 1965 as a company limited by shares.

[7] The objects for which the first respondent was established are to carry on business as trading in electronic and electrical appliances and the like and other objects as set forth in the Memorandum of Association.

[8] LBH together with the second respondent were at the material times, the founders and holders of the entire paid up capital of the first respondent in the following proportions:

(a) LBH — 50,000 (50%)

(b) second respondent — 50,000 (50%)

Total — 100,000 (100%)

[9] The present Directors of the first respondents are the second and third respondents. The second and third respondents are also the only directors of the companies known as Excel Electronics (Penang) Sdn. Bhd. ('EE-Penang') and Innosmart (M) Sdn Bhd ('Innosmart') in which LBH also had 50% of the shareholding. These aforesaid companies together with the first respondent form part of the Excel Group of Companies in Malaysia.

SALIENT BACKGROUND FACTS

[10] In or about 1991, one Ooi Lean Teong ('Ooi') and the second respondent incorporated a company known as Excel Electronics & Industrial Supplies Sdn. Bhd. ('EE&IS') which was involved in the electronics and electrical industry in placecountry-regionMalaysia. Ooi and the second respondent each held a 50% shareholding in EE&IS.

[11] Thereafter, in or about 1992, Ooi and the second respondent met the late Lee Beng Han ('LBH') who expressed an interest to participate in EE&IS by purchasing equity therein.

[12] Following negotiations between Ooi, LBH and the second respondent, it was agreed that Ooi and the second respondent will sell their shares in EE&IS to LBH. As agreed, Ooi and the second respondent transferred their respective shares to LBH resulting in Ooi, LBH and the second respondent each holding a 33.33% equity in EE&IS.

[13] Shortly thereafter, EE&IS was embroiled in litigation with an American entity known as Worldwide Laser Service Corporation. The litigation ended up in a winding up order being made against EE&IS on 4 July 2000 under Kuala Lumpur High Court Winding Up Petition No D5–28–866–1999. Pursuant to the said winding up order, the Liquidator of EE&IS realised the assets of EE&IS which consisted of a parcel of land with a building erected therein, all worth approximately

RM700,000 and monies in the bank amounting to approximately RM35,000. The amount realised by the Liquidator was duly distributed to the creditors of EE&IS. There was surplus from the amount realised and distributed by Liquidator for the benefit of the contributories of EE&IS accordingly. This fact is not denied by the petitioner.

[14] In or about 1994, the third respondent who is the lawful wife of the second respondent together with the second respondent, came upon an opportunity to acquire a company known as Innosmart Sdn Bhd ('Innosmart') which owned a parcel of land with a building thereon. They then acquired all the shares in Innosmart. At the time they purchased the shares in Innosmart, the said property was charged by Innosmart to Citibank Bhd. for a loan. Subsequently, LBH acquired the third respondent's shares in Innosmart resulting in LBH and the second respondent holding a 50% shareholding each in Innosmart. The petitioner has not disputed this fact too.

[15] At all material times, thesecond respondent held 99% shareholding in Electromatic Pte. Ltd ('Electromatic') which was incorporated in or about 1992. Another colleague of the second respondent, held the remaining 1% of the shares therein. LBH never held any shares in Electromatic nor was he involved in its business. Electromatic was a supplier of electronic equipment and sourced for its products from various parts of the world such as in the United States of America, China and Japan.

[16] At the material times, that was another company called EE&IS Philippines owned by LBH. The second respondent was never a shareholder of EE&IS Philippines. At all material times LBH regarded EE&IS Philippines as his personal family business with the petitioner.

[17] At all material times, Electromatic was a supplier of the electronic equipment to EE&IS Philippines and EE&IS who in turn distributed the electronic equipments within the Philippines and Malaysia respectively.

[18] In or about August 1996, LBH suggested that a branch be opened in Penang to distribute electronic equipment to the Northern Region. As such Excel Electronics (Penang) Sdn Bhd ('Excel Penang') was incorporated on 28 August 1998 with LBH and the second respondent held equal shares therein. Electromatics was also the nominated supplier for Excel Penang.

[19] In or about September 1996 and following the problems faced by EE&IS, LBH and the second respondent incorporated the first respondent on 25 September 1996. The first respondent distribute electronic equipment supplied by Electromatic to various parts of Malaysia.

[20] LBH and the second respondent never owned any shares in Excel Electronics Co Ltd (Thailand) ('EE&IS-Thailand') and it is a wholly separate entity.

THE PETITIONER'S COMPLAINTS

[21] The petitioner's concerns began upon the onset of serious illness to the late LBH in late 2001. During this period, the petitioner attempted to procure

information on behalf of the late LBH regarding the first respondent but was rebuffed by the second respondent. Due to his illness, the late LBH was in no position to take any measures to protect his rights and interests at the time. The petitioner alleges that the second respondent by then had taken full control of the first respondent and as subsequent events showed, put into motion his scheme to render the first respondent worthless.

[22] The late LBH's illness became fatal by early 2002. As a result, the petitioner became a widow with two young children and depended on the second respondent to act appropriately to safeguard the interests of the late LBH for their benefit. Nevertheless, the petitioner claims that the second respondent's stance to deny relevant information to the petitioner regarding the first respondent continued.

[23] According to the petitioner, the second respondent began his denial of interest by first instructing the first respondent to cease paying the installments for the late LBH's company car. The petitioner claims that this act was designed to weaken the petitioner's resolve to preserve and claim the interests/benefit of the 50% shareholding. This situation also distracted the petitioner from aggressively pursuing the rights and entitlement attached to the said shareholding.

[24] The petitioner further claims that the second respondent quickly installed his wife, the third respondent as the only other director of the first respondent. This act had the illusion of purportedly filing the director vacancy created by the death of LBH. In fact, the petitioner claims that the appointment was made to have a willing participant for the second respondent's scheme. It also served to shut out and deny fair representation to the petitioner and/or her nominee on the board of the first respondent. As the second and third respondents are the only directors of the first respondent, no one else is able to have access to any of the records of the company.

[25] The petitioner further claims that the second respondent's unlawful conduct was compounded with the concurrent setting up of the fourth respondent (together with the third respondent) as the vehicle for fraud against the first respondent and by implication, the petitioner. The fourth respondent conveniently commenced operations as if it was the first respondent by usurping the business and assets of the first respondent. The petitioner was neither aware of or had any interest in the fourth respondent. The petitioner submits that the act of setting up the fourth respondent clearly shows that the second respondent (with the willing and active participation of the third respondent) intended to render the shares of the first respondent worthless.

[26] The petitioner also alleges that the second respondent ensured the success of his scheme in promoting the business of the fourth respondent by actively coercing the suppliers and customers of the first respondent had ceased business operations. The petitioner submits that such actions effectively transferred the entire business of the first respondent to the fourth respondent. The net effect of such actions would

be to render the shares of the late LBH worthless. Also, the usurpation of the assets and resources of the first respondent to serve the business of the fourth respondent became necessarily automatic.

THE RESPONDENT'S RESPONSE

[27] The respondents say (via the second respondent's affidavit in reply) that first respondent was in fact an equal partnership between the late LBH and the second respondent, formed on the basis of mutual trust and confidence. There was an understanding/arrangement that upon the demise of either LBH or the second respondent, the first respondent would be dissolved accordingly.

[28] The respondents say that despite the late LBH's 50% shareholding, the petitioner and/or successors was not entitled to assert rights attached to such shareholding because of the alleged understanding/arrangement. They also say that not only was the first respondent losing money and was in financial problems, the fourth respondent was also trading at a loss so there was no question of the fourth respondent benefiting at the expense of the first respondent.

[29] The respondents say that the petitioner never requested for any information relating to the first respondent. They also say that the petitioner refused to agree to a dissolution of the first respondent upon the death of LBH pursuant to the understanding/arrangement.

[30] The respondents say that there was a deadlock in the business and management of the first respondent and that the second respondent offered to sell his shares in the first respondent to the petitioner.

[31] The respondents say that there was nothing wrong in the setting up of the fourth respondent. They deny that there was any diversion of the customers of the first respondent to the fourth respondent. Any notices sent to the customers of the first respondent were the personal customers of the second respondent and as the sole surviving partner of the first respondent; he was entitled to such customers procured by him.

[32] The respondents further say that the denial of board representation to the petitioner and/or her nominee is the lawful right of the second respondent as a shareholder of the first respondent. The petitioner has no expectation to be involved in the management and business of the first respondent.

[33] The respondents lastly say that by reason of the lack of mutual trust and confidence between the petitioner and the second respondent, the first respondent ought to be wound up by this court.

FINDINGS OF COURT

[34] Basically, the petitioner moves this court to consider the matter of the first respondent company and the fraudulent and unconscionable conduct of the second

to fourth respondents wholly acting in concert to prejudice the interests of the late LBH and/or his successors in title. In particular, the petitioner alleges that the fourth respondent is the vehicle of the second and third respondents' fraud and the beneficiary of the first respondent's business and assets through unlawful means.

[35] The petitioner further says that upon the illness and subsequent demise of the late LBH who at the material times held 50% of the shareholding of the first respondent, the second and third respondents' greed and opportunistic behaviour as the only directors of the company was calculated to shut out the petitioner from participating in the affairs of the first respondent and so render the said shareholding worthless by systematically siphoning of the first respondent's business and assets to the benefit of the fourth respondent.

[36] In reality each and every entity stated in this case were separate legal entities. LBH and the second respondent were shareholders together in only the first respondent, Excel Penang and Innosmart. LBH and the second respondent were in effect partners. On the evidence available the relationship between LBH and the second respondent was on a basis of mutual trust and confidence on the following understanding:

(a) that at all material times, LBH and second respondent will each hold an equal amount of equity in the first respondent;

(b) that any profits made by the first respondent will be withdrawn and distributed on a quarterly basis save for amounts needed for the ordinary business of the first respondent;

(c) that both LBH and the second respondent will be directors of the first respondent;

(d) that up until in or about 1997, the second respondent will manage the first respondent while LBH concentrated on EE&IS Philippines in which the second respondent had no interest;

(e) that upon a breakdown of mutual trust and confidence or upon the demise of either LBH or the second respondent, the first respondent will be dissolved accordingly; and

(f) that upon LBH's return to Malaysia in or about 1997, LBH and the second respondent both managed the first respondent equally.

[37] The issues for determination by this court are whether on the facts and circumstances of this matter, the first respondent was incorporated by LBH and the second respondent as an incorporated partnership on a mutual trust and confidence basis. If so, whether the second respondent is obliged to continue with the business of the first respondent with the petitioner, LBH's wife, upon the demise of LBH.

[38] In *Ebrahimi v Westbourne Gallaaries Ltd* (1973) AC 360 Lord Wilberforce stated that a limited company is more than a mere judicial entity, with a personality in law of its own: that there is room in company law for recognition of the fact that

behind it, or amongst it, there are individuals, with rights, expectations and obligations *inter se* which are not necessarily submerged in the company structure.

[39] The *Ebrahimi* case was considered by our Court of Appeal in *Kok Fook Sang v Juta Vila (M) Sdn Bhd* [1996] 2 MLJ 666. In dismissing the appeal of the petitioner/Appellant in that case, Mahadev Shankar JCA said at p 673:

> Put shortly, what it means is this, where a company is in substance an incorporated partnership, a winding-up order may be made (under the just and equitable rule) in situations where a partnership may be dissolved by the court. But where the company is not in substance an incorporated partnership, such situations are no longer grounds for a winding-up order to be made under the rule as the use of the partnership analogy is no longer valid.

[40] In *Re Soul D Harrison & Sons Plc* (1995) 1 BCLC 14, Hoffman LJ held that:

> I have in the past ventured to borrow from public law the term 'legitimate expectation' to describe the correlative 'right' in the shareholder to which such a relationship may give rise. It often arises out of a fundamental understanding between the shareholders, which formed the basis of their association but was not put into contractual form, such as an assumption that each of the parties who has ventured his capital will also participate in the management of the company and receive the return on his investment in the form of salary rather than dividend.

[41] In the present case, save for bare denials, the petitioner has not furnished any evidence to refute the fact that LBH and the second respondent were in effect partners in the first respondent and further that there were legitimate expectations *vis a vis* LBH and the second respondent that the relationship between them was on the basis of mutual trust and confidence and that upon a breakdown of that mutual trust and confidence or upon the demise of either one of them, the first respondent would be dissolved accordingly. On the facts of this matter, the second respondent is not obliged to accept the petitioner as the executor of LBH to continue as shareholder in the first respondent.

[42] The courts is of the view that the petitioner has no rights *vis a vis* the first respondent whether in her capacity as a shareholder or otherwise upon the death of LBH when the shares were transmitted into her names pursuant to the Grant of Probate obtained by the petitioner dated 20 November 2002. Further, the petitioner is not a purchaser of LBH's shares in the first respondent for value and therefore took the shares subject to the second respondent's equitable interest as partner and shareholder in the first respondent pursuant to his understanding with LBH.

[43] The contemporaneous documents in this matter points towards the fact that the relationship of LBH and the second respondent in the first respondent were akin to a partnership on a mutual trust and confidence basis. In the circumstances, the principles of partnership law must apply in this case whereupon the demise of one partner, the surviving partner should dissolve the partnership. The first respondent

company is now in a state which could not have been contemplated by the parties when the company was formed.

(see *Re Yenidje Tobacco Co Ltd* (1916) 2 Ch D 426).

[44] In *Ebrahimi v Westbourne Galleries Ltd & Ors* [1972] 2 All ER 492, the court considered the case of *Re Cuthbert Cooper & Sons* (1937) 2 All ER 466 and held that in the case of this nature, upon the death of a shareholder, the remaining shareholder may refuse to register the executor of the deceased as a shareholder. The court further held that such a circumstances amounted to a 'just and equitable' ground for the company to be wound up. Likewise in the present case, the second respondent can refuse to accept the petitioner as a shareholder. This amount to a 'just and equitable' ground for the first respondent to be wound up.

[45] In *Re Lo Siong Fong* [1994] 2 MLJ 72, the court held that the original shareholding may be altered by transfer of shares when the original incorporators leave the company and that it would be impossible for successors to claim the benefit of any expectations held *inter se* be the founding members.

[46] Pursuant to the second respondent's legitimate expectations *vis a vis* LBH, the first respondent must be wound up following the demise of LBH. There is no mutual trust and understanding between the petitioner and the second respondent upon which the first respondent can continue in operation. There was and/or is a deadlock in the business and management of the first respondent. The petitioner can have no expectation to be involved in the management and business of the first respondent.

[47] In *Indrani a/p Rajaratnam & Ors v Fairview Schools Bhd* [1997] 5 MLJ 267 it was held:

> Where a company is virtually a partnership and where the company was formed on the basis of mutual trust and confidence between people and that mutual trust and confidence no longer exists, and there would be a deadlock in a company, then it is just and equitable to wind up the company.

ISSUES RAISED BY THE PETITIONER

[48] The petitioner contends that following the transmission of the deceased shares into her name, she has been excluded from management and that the second respondent's actions are oppressive *vis a vis* her right as a shareholder of the first respondent.

[49] The court is of the view that following the demise of LBH, the second respondent is not obliged to continue the partnership business with the petitioner who is the widow of LBH. Refer to *Ebrahimi v Westbourne Gallaries Ltd*.

[50] The petitioner claims that she is oppressed in that the second respondent did not take steps to pay for the BMW car belonging to LBH. Evidence shows that upon the request of LBH, prior to his demise, the BMW car held in the name of the first

respondent and which was utilised at the time by LBH was disposed off and the proceeds from the sale were paid to the petitioner. This does not amount to oppression *vis a vis* to the petitioner as a shareholder of the first respondent.

[51] Further, the petitioner alleges oppression on the basis that the second respondent has refused to buy out her shares. In this regard, it is material to note that the first respondent was and/or is trading at a loss and this was within LBH's knowledge at the time of his demise. In fact, the audited accounts of the first respondent as at 31 December 1998 exhibited as exh 'ABE-12' of the petitioner's affidavit in support affirmed on 6 March 2007 shows that even during the life of LBH in 1998, the first respondent was running at a loss. In the light of the dire financial condition of the first respondent, the shares of the first respondent are almost worthless.

[52] The offer made by the petitioner for LBH's shares was exorbitant and did not commensurate with the actual value of the shares since the first respondent is trading at a loss. The second respondent had in fact offered the sale of his shares in the first respondent to the petitioner at a price to be negotiated but the petitioner has refused to take up the offer. Despite the petitioner's refusal to take up the second respondent's share, the second respondent is still willing to sell his shares to the petitioner. In the circumstances, the second respondent's refusal to buy out the petitioner's shares in the first respondent cannot amount to an act of oppression.

[53] The petitioner also contends that the third respondent and the second respondent set up the fourth respondent on 2 April 2002 and this prejudices the petitioner's right as a shareholder of the second respondent. Evidence shows that following the demise of LBH, as the surviving shareholder, the second respondent intended to dissolve the second respondent and approached the petitioner as executrix of the estate of LBH under his will and sought her consent to do so. However, the petitioner refused to agree to the dissolution of the second respondent and in fact insisted that both she and her sister in-law be appointed directors of the second respondent upon her obtaining the probate which was then pending in the court.

[54] The court is satisfied that the matters alleged to be oppression by the petitioner are merely management or operational matters and do no amount to oppression in law.

[55] In *Re Elgindata Ltd* (1991) BCLC 959 the court held that:

> Two (2) considerations seem to me relevant. *First*, there will be cases where there is disagreement between the petitioners and the Respondents as to whether a particular managerial decision was, as a matter of commercial judgment, the right one to make, or as to whether a particular proposal relating to the conduct of the company's business commercially sound … In my view, it is not for the court to resolve such disagreements on a petition under *s 459*. Not only is a judge ill-qualified to do so, but there can be no unfairness to the petitioners in those in control of the company's taking a different view from theirs on such matters.

> *Secondly*, … a shareholder acquires shares in a company knowing that their value will depend in some measure on the competence of the management. He takes the risk that management may prove not to be of the highest quality. Short of a breach by a director of this duty of skill and care there is prima facie no unfairness to a shareholder in the quality of the management turning out to be poor.

[56] In *Re Five Minute Car Wash Services Ltd* [1966)] 1 All ER 242, Buckley J said that:

> Unwise, inefficient and careless management does not constitute oppressive conduct. The mere fact that a member of a company has lost confidence in the manner in which the company's affairs are conducted does not lead to the conclusion that he is oppressed; nor can resentment at being out voted; nor mere dissatisfaction with or disapproval of the conduct of the company's affairs whether on grounds relating to policy or to efficiency however well founded amounts to oppression if there is no unfair prejudice.

[57] Further, on the facts of this matter, the petitioner does not and cannot have any legitimate expectation to continue as a shareholder in the first respondent and consequently, there can be no oppression on the petitioner.

CONCLUSION

[58] In conclusion, the court finds that there is no evidence to support the petitioner's complaint of oppression. The facts alluded to by the petitioner, do not in law, amount to acts of oppression. Finally, the petitioner has no legitimate expectation to continue as a partner of the second respondent. In fact, the second respondent has a legitimate expectation to have the first respondent wound up.

[59] In the premise, the court orders that the petition be dismissed with costs and that the first respondent company be wound up.

Petition dismissed. First respondent company wound up.

Reported by Sally Kee